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Supreme Court, U.S.
FILED

No. 97 1819 MAR 26 1998

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1998

BARBARA LYNN LAMBING - - - *Petitioner*

versus

GODIVA CHOCOLATIER - - - - *Respondent*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

PETITION FOR WRIT OF CERTIORARI

BARBARA LYNN LAMBING
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Pro Se

May 8, 1998

WESTERFIELD-BONTE CO., 619 W. KENTUCKY–P.O. BOX 3251, LOUISVILLE, KY.

49 pp

QUESTIONS PRESENTED

The Honorable Circuit Judges, Jones, Daughtery, and Cole, of the Court of Appeals For the Sixth Circuit, United States Court of Appeals, Cincinnati, Ohio, it is asserted made three errors at or following the bench trial in this case. The errors are alleged are stated below:

1. Purview of a patent is not an available legal recourse for non machine (Hand made) chocolate truffles.
2. An author has the first right of publication of copyright protected, registered "writings" (regardless of format, written information and recipé form) for a period of five years from the date of issuance by the U.S. Bureau of Copyrights; and, that includes first right of publication in any trade magazine and/or publication, which the Plaintiff-Appellant did not participate in any form publication in any trade magazine or any other form of written publication in trade competition with the Defendant-Appellee, in the operation of the Plaintiff-Appellant's corporate chocolate business, The Little Brown Rabbit's Chocolate Dippery, Inc. This constitutes copyright infringement by Respondent.
3. "Palming off" is the true test by which it is determined whether a given state of facts constitutes unfair competition as a matter of law in that it has been established by the lower court that the Plaintiff's "David's Trinidad" truffle (written in the Plaintiff's book, *Chocolate Savvy*, contained the trade secret ingredients, the use of a special cocoa, Pernigotti, marketed for retail distribution by only one vendor in the U.S.A., Williams Sonoma — an unpublished but copyrighted book) was copied, sold and manufactured by the Defendant, Godiva Chocolatier, under the name, "Prodigy Truffle". The only source of information was the book contents, from the secret and coded computer files from the Copyright Bureau, the only source of information for the book contents. Three tests must be met to constitute the test: 1) access, 2) identical, and 3) the use of someone else's trade secret. Violation of Fed. R. 26(b) by the Respondent.

LIST OF PARTIES

[x] All parties appear in the caption of the case on the cover page.

[ ] All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

> Godiva Chocolatier, at the inception of the complaint, was owned and operated by Campbell's Soup Company, a New Jersey owned parent corporation.

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Statutes and Rules:

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Other:

Copyright Act of 1976 (Revised) 17 U.S.C. @ 101 et. seq., confers upon the copyright holder exclusive rights to make several uses of his (her) copyright: (1) the right to reproduce the copyrighted work in copies <=3> 17 U.S.C. @ 106(1); (2) the right to prepare derivative work <=4> U.S.C. @ 106(2); [**4] (3) the right to distribute copies of the copyrighted work to the public by sale <=5> 17 U.S.C. @ 106(3) and (4)

Other—continued:

in the case of literary, pictorial, graphic and sculptural works, including individual images, the right to display the copyrighted work publicly. (Cite: 856 F. 2d 1341, *1342, 1988 U.S. App. Lexis 12147, **3; 8 U.S.P.Q.2D (BNA) 1171; Copy. L. Rep. (CCH) P26, 322) 7, 8

No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1998

BARBARA LYNN LAMBING - - - - *Petitioner*

versus

GODIVA CHOCOLATIER - - - - *Respondent*

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[X] For cases from **federal courts:**

The opinion of the United States court of appeals appears at Appendix __ to the petition and is

[ ] reported at No. 97-5697 or,

[ ] has been designated for publication but is not yet reported; or,

[ ] is unpublished.

The opinion of the United States district court appears at Appendix __ to the petition and is

[ ] reported at 96-00522; or,

[ ] has been designated for publication but is not yet reported; or,

[ ] is unpublished.

[ ] For cases from **state courts:**

The opinion of the highest state court to review the merits appears at Appendix __ to the petition and is

[ ] reported at _____ or,

[ ] has been designated for publication but is not yet reported; or,

[ ] is unpublished.

The opinion of the court appears at Appendix __ to the petition and is

[ ] reported at _____ or,

[ ] has been designated for publication but is not yet reported; or,

[ ] is unpublished.

JURISDICTION

[x] For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was February 6, 1998.

[ ] No petition for rehearing was timely filed in my case.

[x] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: March 9, 1998, and a copy of the order denying rehearing appears at Appendix __.

[x] An extension of time to file the petition for a writ of certiorari was granted to and including March 24, 1998 (date) on March 26, 1998 (date) in Application No. A-__.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

[ ] For cases from **state courts:**

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix __.

[ ] A timely petition for rehearing was thereafter denied on the following date: and a copy of the order denying rehearing appears at Appendix __.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A-__.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pursuant to F. Rule 28(a)(6), the law on which the Supreme Court has already reached previous decisions on the rule in the *Stevens-Davis* case, distinguished and precedent law in the "palming off" doctrine, 235 F. Supp. 18, *25; 1964 U.S. Dist. 143 U.S.P.Q. 94 (*16), in that the Federal Courts consider this violation as the "rule of law", "prohibits the use of a name or product so similar to deceive or confuse customers as to be the products of a competitor" (Id). David's Trinidad and the Prodigy Truffle are identical to the naked eye; a direct copy. In the case of Coca-Cola and Colonel Saunder's Kentucky Fried Chicken, both parties copyright recipes were upheld as constitutional copyright law with recipé protection: Coca-Cola's secret

recipe ingredient and Colonel Sanders "11" secret ingredients. Lambing's secret ingredient was the use of Pernigotti cocoa, availability purchase through only one vendor, Williams Sonoma (a California based corporation) (Pernigotti — a corporation of Italy) in the United States. If Godiva's recipés are copyrighted, the Plaintiff-Appellant cannot not find the copyright, only the addresses of their stores in the library access file, but can validate their Ballotin gold box trademark in the infringement case of *Godiva* v. *Dogiva*, 650 F. Supp. 1166, *1169; 1986 U.S. Dist. 231 U.S.P.Q. 562. In the purview of a patent, and a food product, the patent for machine made edible products can only be obtained through the invention of machine made use (see Case *American Chocolate Machinery Co.* v. *Helmstetter*, Cir. Ct., S.D. NY, 129 F. 919; 1904 U.S. APP. 4781.) In the case of book (including all the writings plus the writings of the recipes in copyright protection) writing protection, the law states "any specific reference to publication of the book within a five year period is not permitted until the five year period expires and includes any reference to any writings protected by copyright law and the infringement thereof" (Cite 239 F. Supp. 782, *787; 1965 U.S. Dist. 144 U.S.P.Q. 530), and further, that "the copying of a product is granted injunctive relief" (Cite *Bascom Food Products Corporation and John A. Fressie* v. *Reese Finer Foods, Inc.*, 715 F. Supp. 616 1989 U.S. Dist. 862. In the case of *Millikebn Research Corp.* v. *Dan River, Inc.*, 257 U.S. 312, 42 S. Ct. 124, **127, (1982), distinguishes the unlawfulness of a concert of action when disparaging another's business, and the question becomes by what means did the act occur. Computer piracy is a willful violation. The petitioner must be granted punitive relief and royalty rights based on copyright infringement standing 501 (a) of the Copyright Act 28 U.S.C. 1338(a) and 501(b) (Cite G. P. Putnam's sons, *Terry Southern & Mason Hoffenberg* v. *Lancer Books, Inc.*, J. W. Clement Co., & Publishers Distribution Corp.,

239 F. Supp 782; 1965 U.S. Dist. Lexis 9592; 144 U.S.P.Q.) The Petitioner seeks judgment against the Respondent in a sum to be determined based on "businesses are not expected to disclose trade secrets" Fed. R. 26(b).

STATEMENT OF THE CASE

Federal R. App. P. 28(a)(4) states: The United States Court of Appeals for The Sixth Circuit holding was that Lambing's recipé protection lies in PATENT LAW, not in copyright law (cite: *Publications Int'l, Ltd.* v. *Meredith Corp.*, 88 P.3d, 481 (7th Cir. 1996)); The Lower Cir. Court held that copyright had no protection in recipé form (Id.) The lower court, Civ. No. 96-00522, upheld the VALIDITY of the copyright No. TXU330665 (1988) by the author, Lambing, *Chocolate Savvy*; further, upheld in judge Forrester's holding that the Defendant-Appellee, who DENIED manufacturing and selling the Prodigy Truffle (that was indeed a copy of Lambing's David's Trinidad Truffle) was an untrue statement, based on the photographic evidence submitted to the court, in that the Defendant does manufacture, sell, and retail that truffles in their stores. The lower court refused to grant copyright infringement relief to the Plaintiff, even though the Plaintiff proved the link of direct copying and direct competition, a violation of the Lanham Act, in Lambing's business corporation, The Little Brown Rabbit's Chocolate Dippery, Inc. (a Fla. based corporation owned by the Plaintiff) and the Defendant's corporation, Godiva Chocolatier (owned by Campbell's Soup Corp. (New Jersey based corporation operating a foreign based corporation In Fla.)), and copyright infringement. The Plaintiff appealed to the Court of Appeals for justice based on grounds of computer piracy in that the Defendant had in their possession a copy of the Plaintiff's book that could have only been obtained by unlawful code entry into the records of the copyright bureau, which the book contents contained Lambing's corporate trade secret recipes' (never

supplied to Godiva, their attorneys or by publication in any article, trade publication, etc.) Lambing was denied royalty rights paid to copyright book authors in compensatory damages and punitive damages. Lambing's book truffles were pirated and palmed off as Godivals original recipé which are not copyrighted, trademark on gold boxes registered. The Plaintiff's truffles were not a machine made product; the truffles were a chocolate hand-made product. Therefore, the Plaintiff-Appellant is unable to secure a patent on non made machine produced chocolate truffles. Every product at Lambing's corporation were made and produced by hand, not machine, so how can *Publications* v. *Meredith*, be applicable on two grounds: 1) no patent rights granted to non machine made products and 2) both courts, even after supplying the copies of newspaper advertisements (by Burdines Dept. Store) and articles written about Lambing in *The Boca News*, *The Miami Herald*, and *The Ft. Lauderdale Sun-Sentinel*, refused to believe that the Plaintiff never published her trade secret recipes' in any publication (which was the argument presented in the Dannon yogurt case)? Lambing's picture and photographs of her chocolate designs, products and truffles appeared in the articles and advertisements, as her little company was well known and recognized by the general public. The Defendant-Appellee was guilty of perjury by denying the manufacture of the Prodigy truffle, as it would admit the copying of the product, that is identical to Lambing's David's Trinidad. The Plaintiff-Appellant also supplied documentary evident to the Appeals Court that the use of a computer code "greystone" was the only admittance into the visitor status into the copyright bureau to see the registered copyright of *Chocolate Savvy*. To gain information to the book contents requires visitor code word entry into the computer file database (Lambing does not know the code word). If the Plaintiff-Appellant had done this to the Defendant-Appellee, the punishment would have been injunc-

tive remedies and damages, by the rules of law. The Petitioner requests discretionary review by The Supreme Court of the United States on the grounds of unfairness of the decision, injustice, violation of corporate ethics, as well as, a total negation of the copyright system of rewards that was supposed to be designed s a reward system for the artist of this country. This case is an outrage of civil injustice. The Petitioner requests The Supreme Court Justices to reverse the decision of the Appeals Court and to rise and uphold the Law of Copyright, Revised 1976, by affirming the right of artisan book copyright law. The Petitioner requests oral argument according to Fed. R. 28. Pursuant to Fed. R. 28(a)(4), the Plaintiff-Appellant, having sold her corporation, applied to Godiva Chocolatier, supplying employment resume, in May of 1996. While waiting for a reply, Lambing, unaware of the infringement, visited the Godiva store in the Galleria Mall, Ft. Lauderdale, Fla. Taking a look at their chocolate products, in preparation for employment interview to discus stock and designs, discovered the Prodigy Truffle, immediately knowing it was a direct copy of her designs and recipé. Lambing knew that Godiva had not produced that truffle at Macy's, Burdines, and Jordan Marsh, because their products were sold and displayed side-by-side at the department stores, chocolate marketing sections, in direct competition. Lambing returned to her home, picked up the Kodak camera, returned to the store an hour later; took pictures of the Godiva store, the Prodigy Truffle, Godiva store employees and other customers in the store at the time, purchasing the Prodigy truffles, charged to her American Express card for receipt purposes (all evidence supplied to the court, filed with the original complaint of copyright infringement). The Plaintiff has continued to battle in the courts of law, the Defendant-Appellee for two years, pro se, in defense of her copyright rights, and the huge pool of attorneys hired by Campbell's Soup Co. employed to defeat a "mom and pop" S-corporation,

chocolate artist/designer. The Plaintiff has stood strong against a huge corporate giant, who willfully and knowingly palmed off Lambing's book writing and trade secret (the use of a special cocoa, Pernigotti, sold by only one vendor in the U.S.A., Williams Sonoma (a Calif. based corporation)). There would be no reason to hire an employee, when the corporation has already had access to the trade secret of a small corporation and chocolate artist. (The Plaintiff has many other copyright designs in chocolate registered with the Bureau of Copyright, awarded to Lambing).

REASONS FOR GRANTING THE PETITION

The Plaintiff-Appellant, pro se, appeals to the Supreme Court Justices in that this case in the Civil System of Justice is similar to over one thousand cases that the Plaintiff-Appellant has read during the last two years, many pulled by-hand and many hours and hours and hours on the law computer. I have not stood alone, as the list of plaintiffs, defeated, is almost endless. Nor does it take into account, the number of cups of coffee and dinners and breakfasts and lunches that I have served, in an effort to pay my legal expenses. Unlike an attorney, no compensation for fees and the hours in the law libraries. The Copyright Act of 1976 was effected by becoming law to end the plight of artists and designers, who comprise the backbone of this country, as would-be entrepreneurs, designers, inventors, writers and sculptors. The copyright is a reward for talent: to defend your copyright is punishment. I cannot find a single case where the individual artist has defeated the corporate veil. It was apparent by the Copyright Act of 1976 that a problem existed in this country . . ., nothing has changed. No royalties have been awarded. The law of the Act have not been upheld by the court system. . . the old system is still totally intact, as it was before 1976. Until the Supreme Court sets an example, this injustice

will continue; until the Supreme Court stops this corporate injustice and piracy, nothing will change; until the Supreme Court enforces the laws of the land, the same old, same old exists. It's like being invited to dinner, your name card is placed by the water goblet, everyone is served but the copyright holder who is not allowed to eat or drink. The royalties belong to "we the people." This is my country.

If an arbitration committee, comprised of a twelve member board, each member must hold and own a valid copyright, selected from a statewide poll of copyright owners from the fields of art, sculpting, music, writing and inventions, that would hear each case on the merits presided over by a judicial representative that rules only on the points of law such as federal admission of evidence and that the membership decides on the merits of the case (a member may not be an insurance company representative). Each petitioner in the event that arbitration cannot resolve each case, then, a right to appeal is heard by federal circuit court. It is unfair to award an artist a copyright that is not inexpensive to register by an attorney and than, never have enough money to judicially fight the case, and then, to struggle to pay an attorney costs in a no win situation. The emotional copyright scars on this land, at best, are devastating.

This artist, having read over one thousand cases of copyright, trademark, serviceman and patent infringement, the only win cases involved corporation v. corporation and one case of respondent superior where the employee won. Only the most important cases, being distinguished or setting precedent are in the federal records. Can you imagine how many cases are in the state archives and federal archives? If Shakespeare wrote in recipé form, instead of lyric, would you have denied his right to a copyright? I ask this distinguished group of judges, the same question, I

asked the Court of Appeals judges, "What form would you expect a chocolate author to write a book except but in recipe form"? What was the point to establish a small corporation, to design and sculpt in chocolate, to copyright the designs, to copyright and write a book about chocolate, to struggle and work hard, if only to have a large corporation in competition, like Godiva Chocolatier and Joseph Schmidt Confections (*Lambing* v. *Joseph Schmidt Confections*, Civil Case No. 96-513) where Judge Weymour refused to acknowledge sculpting in chocolate as right to be granted copyright design, denying the right of the Copyright Bureau to grant a copyright, as his judicial authority to refute the right of a granted copyright, and the denial of the right of a plaintiff to be entitled to parent corporation disclosure, to palm off copyright designs. Lambing is not complaining about the fifteen years of devotion to the chocolate business, or the seven days weeks and 15-20 hour work days, as the Petitioner truly thanks God for the gift of talent and the stamina to work diligently; as well as, the gracious and loyal customers that supported my small corporation. What Lambing is complaining about was what was the point to endeavor to do well, only to have one's ideas given credit to another corporation in the eyes of the American public, and to use a trade secret, as if it were theirs. Dan Marino throws a mean football, Joe Namath — endless touchdown passes, John Campbell drives the sulky bike in Harness Racing, Mark Spitz swims. The list is endless of those recognized for their talent, and their reward is also financial recognition. Is it just to deny the royalties? Are not the royalty payments due in full? I ask you gentlemen, what is the American copyright dream?

Wherefore, the Petitioner, pro se, seeks the prayer for relief demanding judgment against the Respondent in a sum to be determined by The Supreme Court of the United States of America, including a reversal of the patent hold-

ing by the Court of Appeals.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

BARBARA LYNN LAMBING
1877 Timber Creek Drive
Lexington, Kentucky 40509
Pro se

Date: April 10, 1998

PROOF OF SERVICE

I, Barbara Lynn Lambing, do swear or declare that on this date, 8th day of May, 1998, as required by Supreme Court Rule 29, I have served the enclosed MOTION FOR LEAVE TO PROCEED IN *FORMA PAUPERIS* and PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid.

The names and addresses of those served are as follows: Russell B. Morgan, Barry D. Hunter, Carl A. Henlein, Brown, Todd & Heyburn, 250 West Main Street, Suite 2700, Lexington Financial Center, Lexington, Ky. 40507-1634

I declare under penalty of perjury that the foregoing is true and correct.

Executed on May 8, 1998.

BARBARA LYNN LAMBING
1877 Timber Creek Drive
Lexington, Kentucky 40509
Pro se

APPENDIX

APPENDIX _

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 97-5697

BARBARA LYNN LAMBING, - - *Plaintiff-Appellant,*

versus

GODIVA CHOCOLATIER, - - *Defendant-Appellee.*

ORDER—Filed February 6, 1998

Before: JONES, DAUGHTREY, and COLE, Circuit Judges.

This pro se litigant appeals a district court judgment dismissing her suit for copyright infringement filed pursuant to the Copyright Act of 1976, 17 U.S.C. §§ 101, *et seq.* This case has been referred to a panel of the court pursuant to Rule 9(a), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

Seeking monetary damages and future royalties, Barbara Lynn Lambing sued Godiva Chocolatier, Inc. ("Godiva"). Lambing claimed that Godiva misappropriated her proprietary rights in the recipe and design of a chocolate truffle by copying her design of a truffle known as "David's Trinidad."

Godiva moved to dismiss Lambing's complaint pursuant to Fed. R. Civ. P. 12(b)(6), and on June 6, 1997, the district court granted Godiva's motion and dismissed Lambing's complaint. Lambing appeals that judgment.

In her timely appeal, Lambing reasserts the claim she set forth in the district court. In addition, for the first time on appeal, Lambing argues that Godiva violated her rights under the Lanham Act, 15 U.S.C. §§ 1051, et seq.

Unless exceptional circumstances are present, the court normally will not address an issue not first raised in the district court. *Foster* v. *Barilow*, 6 F.3d 405, 407 (6th Cir. 1995). Lambing's claim that Godiva violated her rights under the Lanham Act was not first raised in the district court, and no exceptional circumstances exist warranting review.

Whether the district court correctly dismissed a suit pursuant to Fed. R. Civ. P. 12(b)(6) is a question of law subject to de novo review. *Sistrunk* v. *City of Strongsville*, 99 F.3d 194, 197 (6th Cir. 1996), *cert. denied*, II7 S. Ct. 2409 (1997). The court must construe the complaint in a light most favorable to the plaintiff, accept all the factual allegations as true, and determine whether the plaintiff undoubtedly can prove no set of facts in support of his claim that would entitle him to relief. *Id.*

Upon de novo review, we conclude that Lambing can prove no set of facts in support of her claim that would entitle her to relief. Lambing argues that Godiva violated her copyright by preparing and selling a truffle described in one of the recipes contained in her unpublished book, *Chocolate Savvy*. Recipes, however, are not copyrightable. *Publications Intl, Ltd.* v. *Meredith Corp.*, 88 F.3d 473, 480-81 (7th Cir. 1996). The identification of ingredients necessary for the preparation of food is a statement of facts. There is no expressive element deserving copyright protection in each listing. *See* id. at 480. Thus, recipes are functional directions for achieving a result and are excluded from copyright protection under 17 U.S.C. § 102(b). *See id.* at 481.

Accordingly, the district court's judgment is affirmed pursuant to Rule 9(b)(3), Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Clerk

APPENDIX _

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY
LEXINGTON

Civil Action No. 96-522

BARBARA LYNN LAMBING, - - - - *Plaintiff*

versus

GODIVA CHOCOLATIER, - - - - *Defendant*

JUDGMENT—Filed June 6, 1997

* * * * * * * * * * *

In accordance with the opinion and order entered contemporaneously with this judgment, the Court hereby ORDERS AND ADJUDGES:

(1) Plaintiff's complaint is DISMISSED;

(2) this judgment is final and appealable, and no just cause for delay exists; and

(3) this matter is STRICKEN from the active docket.

This 6th day of June, 1997.

/s/ Karl S. Forester
KARL S. FORESTER, JUDGE

APPENDIX _

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY
LEXINGTON

Civil Action No. 96–522

BARBARA LYNN LAMBING, - - - - *Plaintiff*

versus

GODIVA CHOCOLATIER, - - - - *Defendant*

OPINION AND ORDER—Filed June 6, 1997

* * * * * * * * * * *

I

Plaintiff Barbara Lynn Lambing, chocolate maker and author of a work entitled *Chocolate Savvy*,[1] a book containing recipes and instructions for preparing truffles, filed this *pro se* action on December 13, 1996 alleging that Defendant Godiva Chocolatier ("Godiva") misappropriated her proprietary rights in the recipe and design of a specific type of chocolate truffle. Specifically, Plaintiff contends that Godiva copied her design for a truffle known as "David's Trinidad." As explained in the recipe attached to Plaintiff's complaint, "David's Trinidads are an original recipe using a double truffle batter, rolled in toasted coconut and dipped in white chocolate. The truffle is topped with an orange rose fleur-de-lis with a green stem." (DE #I). Plaintiff's complaint alleges that Godiva copied the

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[1]It is unclear to the Court whether this book was ever published.

design of "David's Trinidad" by selling truffles called "Prodigy" in their retail stores. Plaintiff seeks damages for copyright design infringement and royalties in the sum of $2,500,000.00, plus $5,000.00 per month since 1991.

On February 18, 1997 Defendant Godiva filed a motion to dismiss Plaintiff's complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief can be granted. Plaintiff filed a response on February 21, 1997. The time for filing a reply having passed, this matter is now ripe for review.

II

The grant of a motion to dismiss pursuant to F.R.C.P. 12(b)(6) is appropriate only when it appears that the Plaintiff can prove no set of facts in support of her claim which would entitle her to relief. In ruling upon the motion, the Court must view the complaint in the light most favorable to the Plaintiff, and resolve every doubt in favor of the Plaintiff. *Jenkins* v. *McKeithen*, 395 U.S. 411, 89 S.Ct. 1843, 23 L.Ed.2d 404 (1969); *Davis H. Elliot Co.* v. *Caribbean Utilities Co.*, 513 F.2d 1176, 1182 (6th Cir. 1975).

In support of its motion, Defendant Godiva points out that it has been using its own recipes to manufacture and sell truffles throughout the world for over 25 years. Furthermore, Defendant denies that it sells either a truffle called "Prodigy" or a white chocolate truffle combined with toasted coconut. Nevertheless, viewing the complaint in the light most favorable to Plaintiff, the Court will assume that Defendant Godiva does in fact manufacture and sell "Prodigy" truffles. Therefore, as pointed out by Defendant, Plaintiff's contention appears to be that since she published and copyrighted a recipe for a type of chocolate truffle, specifically a "David's Trinidad" truffle, Godiva must pay her royalties if it wishes to prepare or create that truffle. Viewing the allegations in the complaint in the light most favorable to Plaintiff, Defendant nevertheless argues that the Court should dismiss Plaintiff's complaint because it is certain that Plaintiff can prove no set of facts in support of her claim that would entitle her to relief.

In response, Plaintiff attempts to distinguish the authorities cited by Defendant Godiva and directs the Court's attention to the photographs included with her complaint in support of the contention that Godiva did in fact sell "Prodigy" truffles. In addition, Plaintiff clarifies that she has not accused Godiva of copying the inside truffle composition, by which she presumably means the ingredients. Rather, Plaintiff argues that Defendant Godiva copied the design of her "David's Trinidad" truffle. Finally, Plaintiff makes reference to two cases which purportedly support her position. However, Plaintiff failed to provide the Court with the proper citation to these cases.

III

Section 102 of the Copyright Act of 1976, 17 U.S.C. § 101 *et seq.*, provides as follows:

> (a) Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories:
>
> (1) literary works;
>
> (2) musical works, including any accompanying words;
>
> (3) dramatic works, including any accompanying music;
>
> (4) pantomimes and choreographic works;
>
> (5) pictorial, graphic, and sculptural works;
>
> (6) motion pictures and other audiovisual works;
>
> (7) sound recordings; and
>
> (8) architectural works.
>
> (b) In no case does copyright protection for an original work of authorship extend to any idea, pro-

> cedure, process, system, method or operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.

17 U.S.C § 102.

The plain language of the statute makes clear that Plaintiff's copyright only extends protection to her original work of authorship, i.e., her book *Chocolate Savvy*, which falls in the category of literary work. However, the statute also makes clear that copyright protection does not extend to ideas, procedures, or processes, etc., embodied in an original work of authorship, regardless of the form in which they are described, explained, illustrated, or embodied in the work.

As for the recipes contained in *Chocolate Savvy*, the Copyright Office itself has stated that "mere listing[s] of ingredients or contents" are not copyrightable. 37 C.F.R. § 202.1. Furthermore, as recognized by the Seventh Circuit Court of Appeals in *Publications International, Ltd.* v. *Meredith Corp.*, 88 F.3d 473, 481, (7th Cir. 1996),

> there can be no monopoly in the copyright sense in the ideas for producing certain foodstuffs. Nor can there be copyright in the method one might use in preparing and combining the necessary ingredients. Protection for ideas or processes is the purview of patent. The order and manner in which [the recipes are presented] are part and parcel of the copyright in the compilation, but that is as far as it goes.

Thus, while Plaintiff's copyright protects the order and manner in which she presented the recipes in her book, it goes no farther. It does not give Plaintiff the exclusive right to express the process of combining the ingredients necessary to make various types of truffles.

The complaint in this case, however, is not that Defendant violated Plaintiff's copyright by publishing Plaintiff's recipes in its own book. Rather, Plaintiff s complaint is that Defendant Godiva violated the copyright by preparing

and selling a truffle described in one of the recipes contained in *Chocolate Savvy*. The copyright, however, does not give Plaintiff a monopoly on use of the recipes and processes contained in her book, nor does it prohibit third parties from using her recipes to make truffles. In short, Plaintiff's copyright only protects her original literary work, not the truffles which are created by following her recipes.

Accordingly, even assuming *arguendo* that Defendant Godiva did in fact produce and sell "Prodigy" truffles, such activity would not violate Plaintiff's copyright, nor would it entitle Plaintiff to royalties. Thus, viewing the complaint in the light most favorable to Plaintiff, it appears to the Court that Plaintiff can prove no set of facts in support of her claim which would entitle her to relief. Therefore, IT IS HEREBY ORDERED that:

(1) Defendant Godiva Chocolatier's motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(6) for failure to state a claim upon which relief can be granted [DE #7] is GRANTED; and

(2) a judgment will be entered contemporaneously with this opinion and order in favor of Defendant Godiva Chocolatier.

This 6th day of June, 1997.

/s/ Karl S. Forester
KARL S. FORESTER, JUDGE

APPENDIX _

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 97-5697

BARBARA LYNN LAMBING, - - *Plaintiff-Appellant,*

versus

GODIVA CHOCOLATIER, - - *Defendant-Appellee.*

ORDER—Filed February 6, 1998

Before: JONES, DAUGHTREY, and COLE, Circuit Judges.

Plaintiff-appellant has filed a motion for reconsideration of this court's order of February 6, 1998, affirming the district court's judgment dismissing her suit for copyright infringement filed pursuant to the Copyright Act of 1976, 17 U.S.C. §§ 101, et seq.

Upon careful consideration, this panel concludes that it did not misapprehend or overlook any point of law or fact when it issued its order. Fed. R. App. P. 40(a). Protection for Lambing's recipe lies more within the realm of patent law, rather than copyright. See *Publications Intl, Ltd* v. *Meredith Corp.*, 88 F.3d 473, 481 (7th Cir. 1996).

The motion for reconsideration is thus DENIED.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Clerk

APPENDIX _

THE UNITED STATES SUPREME COURT

Case No. _____

BARBARA LYNN LAMBING, - - *Plaintiff-Appellant,*

versus

GODIVA CHOCOLATIER, - - *Defendant-Appellee.*

Appeal From the United States Court of Appeals
For the Sixth Circuit, Case No. 97–5697,
Civil Action No. 96–00522.

NOTICE OF FILING OF BRIEF

Filed March 26, 1997

Plaintiff-Appellant, pro se hereby files forty copies of its brief, for Writ of Centiorari, requesting discretionary approval and review by The Supreme Court of The United States of America and hereby serves two copies (Appendix included) on Appellee, by certified mail, Barry D. Hunter, Brown, Todd & Heyburn, 250 W. Main Street, Suite 2700, Lexington Financial Center, Lexington, Kentucky, 40507-1634, on this 24th Day of March, 1998.

Respectfully submitted,

/s/ Barbara Lynn Lambing

Barbara Lynn Lambing
Pro se
1877 Timber Creek Drive
Lexington, Kentucky 40509
(606) 263-7847

APPENDIX _

LETTERHEAD OF
UNITED STATES COURT OF APPEALS

Filed March 30, 1998

Leslie G. Whitmer
Eastern District of Kentucky at Lexington
P.O. Drawer 3074
Lexington, KY 40596-3074

RE: 97-5697
Lambing vs. Godiva Chocolatier
District Court No. 96–00522

The mandate issued in the above-styled case.

Please be advised that the certified record will be sent under separate cover.

Diane Schnur
Deputy Clerk

cc:

Honorable Karl S. Forester
Barbara Lynn Lambing
Russell B. Morgan
Mr. Barry D. Hunter
Mr. Carl A. Henlein

APPENDIX _

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 97-5697

BARBARA LYNN LAMBING, - - *Plaintiff-Appellant,*

versus

GODIVA CHOCOLATIER, - - *Defendant-Appellee.*

MANDATE—Filed February 6, 1998

Pursuant to the court's disposition that was filed 2/6/98 the mandate fox this case hereby issues today.

A True Copy.

Attest:

/s/ Diane Schnur
Deputy Clerk

COSTS: NO COSTS
Filing fee .....$
Printing .....$
Total.....$

8TH CASE of Level 2 printed in FULL format.

COCA-COLA CO. v. BUSCH et al.

Civil Action No. 1113

District Court, E.D. Pennsylvania

44 F. Supp. 405; 1942 U.S. Dist. LEXIS 2998; 52 U.S.P.Q. (BNA) 377

January 12, 1942

OPINION BY: [**1]

GANEY

OPINION: [*406] GANEY, District Judge.

The bill in this case seeks relief by injunction, both preliminary and perpetual, against the defendants, their attorneys, employees, servants, representatives and assigns, from (a) using upon or in connection with the manufacture, advertising, offering for sale or sale of any beverage syrup of beverage made therefrom, the work "koke" whether in association with the word "up" or any other word or words, and whether spelled "koke" or otherwise; (b) infringing plaintiff's trademark "Coca-Cola" in any other manner or form whatsoever, and from competing unfairly with the plaintiff in any other manner or form whatsoever, etc.

After alleging the required jurisdictional qualifications, the plaintiff's [**ILLEGIBLE**] avers that it is engaged and has been for many years in the manufacture of soft drink syrup under the trademark "Coca-Cola"; that a considerable portion of the public abbreviate the trademark to "koke (coke)"; and call for it as "koke (coke)"; that when offered as a soft drink "Koke (coke)" means "Coca-Cola"; that the defendants have adopted a name to be used on a soft drink the words "Koke-Up" and have caused the same to be copyrighted [**2] in the United States Patent Office; that the defendants threaten to manufacture, advertise, offer for sale and sell a soft drink, using the name "Koke-Up"; that unless enjoined by the court the defendants will carry out their threat and put on the market a soft drink named

"Koke-Up"; that these threatened acts will constitute unfair competition; that the application of the word "koke" to a soft drink is a representation that it is "Coca-Cola". The answer inter alia denies that a considerable number of the public abbreviate the trademark "Coca-Cola" to "koke (coke)", or call for "'Coca-Cola" as "koke (coke)", but that the public refers to and calls the plaintiff's product "Coca-Cola"; it is admitted that the defendants intend to manufacture, offer for sale and sell soft drinks and use thereon the name "Koke-Up"; it is further denied that the acts averred in the complaint constitute unfair competition in the use of the name "Koke-Up" as a soft drink, and that in no wise is it a representation that it is "Coca-Cola".

It can be seen that this bill is to prevent threatened injury to the plaintiff, as the defendants' product, "Koke-Up," is not presently made or manufactured. During the [**3] taking of testimony on the application for the preliminary injunction, it was agreed by both sides that the matter should be disposed of as of final hearing. It was further shown at the hearing that the other defendant, Curtis A. Davies, had withdrawn from the enterprise and all rights to the enterprise were owned by the defendant Busch alone.

PAGE 2

1ST CASE of Level 1 printed in FULL format.

KENTUCKY FRIED CHICKEN CORPORATION,
Plaintiff-Appellee, v.

DIVERSIFIED PACKAGING CORPORATION et al.,
Defendants-Appellants

No. 74–3060

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

549 F.2d 368; 1977 U.S. App. LEXIS 14128; 193 U.S.P.Q. (BNA)

649; 1977-1 Trade Cas. (CCH) P61,339
March 25, 1977

PRIOR HISTORY: [**1]

Appeals from the United States District Court for the Southern District of Florida.

DISPOSITION: AFFIRMED.

COUNSEL: Burton H. Shostak, St. Louis, Missouri

Lloyd A. Palans, St. Louis, Missouri

Edward F. O'Herin, Malden, Missouri

Philip de V. Claverie, New Orleans, Louisiana, for Appellant.

William I. Dunaj, Miami, Florida

Robert R. Feagin, III, Tallahassee, Florida, for Appellee.

JUDGES: Brown, Chief Judge, and Jones and Goldberg, Circuit Judges.

OPINION BY: GOLDBERG

OPINION: [*372] GOLDBERG, Circuit Judge:

This case presents us with something mundane, something novel, and something bizarre. The mundane includes commercial law issues now well delimited by precedent. The novel aspects of the case center on intriguing and difficult interrelationships between trademark and antitrust concepts. And the bizarre element is the facially implausible — some might say unappetizing — contention that the man whose chicken is "finger-lickin' good" has unclean hands.

Kentucky Fried Chicken Corporation, a franchiser of fast-food restaurants, brought this action claiming that defendants were infringing its trademarks and engaging in unfair competition by their manner of selling boxes and other supplies [**2] to Kentucky Fried franchisees. Defendants placed Kentucky Fried's trademarks on the supplies without Kentucky Fried's consent, and they allegedly misled franchisees with respect to the supplies' source and quality. Defendants counterclaimed, asserting that Ken-

tucky Fried's franchise agreements, which required franchisees to buy supplies from approved sources, constituted an illegal tying arrangement. The district court, in a penetrating opinion

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LEVEL 1 — 47 OF 50 CASES

AMERICAN CHOCOLATE MACHINERY CO. v. HELMSTETTER

AMERICAN CHOCOLATE MACH. CO. v. HELMSTETTER

Circuit Court, S.D. New York

129 F. 919; 1904 U.S. App. LEXIS 4781

March 14, 1904

OPINION: [*919] COXE, Circuit Judge. This action is founded on three letters patent for improvements in the confectionery art. They are as follows: No. 492,205, granted February 21, 1893, to Daniel M. Holmes; No. 526,968, granted October 2, 1894, to Cyprien Gousset and No. 533,974, granted February 12, 1895, to William Walter.

The complainant is a New York corporation engaged in the manufacture and sale of machinery for making chocolate confections and is the owner of the patents in controversy. The defendant is engaged in making chocolate creams in the city of New York and, in such business, uses apparatus alleged to

infringe. Holmes seems to have been the first person to produce a successful automatic machine for coating cream cores with chocolate. The portion of the machine in contro-

versy relates to mechanism whereby the cream cores are properly held in position, dipped in the chocolate solution, withdrawn therefrom and the surplus chocolate removed by means of a jarring action imparted to the holding frame or dipper. The first claim of the Holmes patent, the only one involved, is as follows: [**2]

"In a machine of the character herein specified, the combination with the drop dipping mechanism, of a jarring device for removing surplus coating material from the drops, substantially as shown and described."

This combination contains two elements, first, a drop dipping mechanism, and, second, a jarring device for removing the surplus chocolate; both elements, of course, must be found in a machine for coating confectionery as described and shown.

The jarring device is thus referred to in the specification:

"As the dipping mechanism reaches its highest point, the finger is no . . .

129 F. 919, *920; 1904 U.S. App. LEXIS 4781, **3

combination of the first claim of the second patent.

The defendant [**4] seeks to avoid infringement by placing unnecessary limitations upon the claim. To paraphrase the language of the Supreme Court it may be said that "Holmes, having been the first person who succeeded in producing an automatic machine for coating chocolate cream drops in entitled to a liberal construction of the claims of his patent. He was not a mere improver upon a prior machine which was capable of accomplishing the same general result; in that case his claims would properly receive a narrower interpretation." <=|> Sewing Machine Co. v. Lancaster, 129 U.S. 263, 9 Sup. Ct. 299, 32 L. Ed. 715.

The defendant's machine is made under letters patent No 634,633 granted to W. H. Weeks October 10, 1899. It is

argued that the defendant's jarring frame is not the "jarring device" of the claim. It certainly is not the exact apparatus shown and described by Holmes but it accomplishes the same result in substantially the same way and only differs in nonessential details. The defendant's tray, filled with the candy cores, is detachably hung on hooks of the dropping mechanism which descends into the chocolate solution and then rises until its upward course is arrested by appropriate devices. The [**5] tray is then taken, manually, from the hooks and moved laterally upon guides to the jarring frame which is part of the same machine and is placed over a . . .

239 F. Supp. 782, *787; 1965 U.S. Dist. LEXIS 9592, **13; 144 U.S.P.Q. (BNA) 530

This construction is reinforced by Section 23 which provides:

'Whenever within the period of such ad interim protection an authorized edition of such books or periodicals shall be published within the United States, in accordance with the manufacturing provisions specified in section 16 of this title, and whenever the provisions of this title as to deposit of copies, registration, filing of affidavits, and the printing of the copyright notice shall have been duly complied with, the copyright shall be extended to endure in such book or periodical for the term provided in this title.'

The specific reference to publication of the book in the United States 'within the period of such ad interim protection,' i.e., within the five years, gives rise to a permissible inference that if the book is not published in the United States until after the five-year period has expired, no permanent copyright on it can be secured.

Both sections are also silent as to whether it makes any difference that the importation of the foreign edition [**14] was impossible during part or all of the five-year period because of other statutes relating to standards of morality and decency.

1ST CASE of Level 1 printed in FULL format.

Re Bascom Food Products Corporation and John A. Fressie v. Reese Finer Foods, Inc., John Beers, Gary Greenhouse, Jerry Kehe, Jerry Dorf, Carl McCraw and Norm Wine

Civil Action No. 89–1138

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

715 F. Supp. 616; 1989 U.S. Dist. LEXIS 7087; 1989–2 Trade Cas. (CCH) P68,862

June 1, 1989, Decided
June 1, 1989, Filed

COUNSEL: [**1] Gerald Krovatin, Esq., Lowenstein, Sandler, Kohl, Fisher & Boylan, Roseland, New Jersey and Jeffrey L. Kessler, Esq., Weil, Gotshal & Manges, New York, New York (Attorneys for Plaintiffs Bascom Food Products Corp. and John A. Fressie).

Frank Holahan, Esq., Harwood Lloyd, Hackensack, New Jersey and Jack L. Lahr, Esq., Foley & Lardner, Washington, District of Columbia (Attorneys for Defendant Reese Finer Foods, Inc.).

Raymond R. Wiss, Esq., Winne, Banta, Rizzi, Hetherington & Basralian, Hackensack, New Jersey (Attorneys for Defendants John E. Beers, Gary L. Greenhouse, Jerry Kehe and Carl G. McGraw).

Charles J. Walsh, Esq., Sills, Cummis, Zuckerman, Radin, Tischman, Epstein & Gross, Newark, New Jersey (Attorneys for Defendants Jerry Dorf and Norman L. Wine, Jr.).

JUDGES: Alfred J. Lechner, Jr., United States District Judge.

OPINION BY: LECHNER, JR.

OPINION: [*617] LETTER-OPINION AND ORDER

ORIGINAL FILED WITH the CLERK of the COURT

ALFRED J. LECHNER, JR., UNITED STATES DISTRICT JUDGE

Counsel:

This matter is currently before the court on the application of John A. Fressie ("Fressie") and Bascom Food Products ('Bascom Food") (collectively the "plaintiffs"), for preliminary injunctive relief requiring certain affirmative action on the part of defendant Reese Finer Foods, Inc. ("Reese Foods"), [**2] and several individual defendants (collectively the "defendants"). For the reasons that follow, plaintiffs' application for injunctive relief is granted.

Facts n1

- - - - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - - - -

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LEVEL I — 43 OF 92 CASES

MILLIKEbN RESEARCH CORP. v. DAN RIVER, INC.

Civil Action No. 70–C–13–D

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
VIRGINIA, DANVILLE DIVISION

641 F. Supp. 4; 1982 U.S. Dist. LEXIS 18225

December 28, 1982, Decided
December 29, 1982, Filed

OPINION:

. . . [*17] [**41] suppressed, or concealed" within the meaning of @ 102(g). See <=61> Application of Bass, 59 C.C.P.A. 1342, 474 F.2d 1276, 1283-87 (CCPA 1973); <=62> Sutter Products Co. v. Pettibone Mulliken Corp., 428 F.2d 639, 645-47 (7th Cir. 1970). The plaintiff does not appear to contest this general proposition; rather, plaintiff maintains that Cooper '885 does not disclose

257 U.S. 312, *326; 42 S. Ct. 124, **127;
1921 U.S. LEXIS 1345, ***24; 66 L. Ed. 254

(5) By seeking to disparage plaintiffs' restaurant, charging that the prices were higher and the food worse than in any other restaurant, and that assaults and slugging were a regular part of the bill of fare, with police indifferent.

(6) By attacking the character of those who did patronize, saying that their mental calibre [***25] and moral fibre fell fra . . .

. . . [*327] [**127] [** *25] customers to his place of business is incident [***26] to such right. Intentional injury caused to either right or both b a conspiracy is a tort. Concert of action is a conspiracy if its object is unlawful or if the means used are unlawful. <=73> Pettibone v. United States, 148 U.S. 197, 203; Duplex Printing Press Co. v. Deering, supra. Intention to inflict the loss and the actual loss caused are clear. The real question here in, were the means . . .

239 F. Supp. 782, *785; 1965 U.S. Dist. LEXIS 9592, **7;
14.4 U.S.P.Q. (BNA) 530

'No action or proceeding shall be maintained for infringement of copyright in any work until the provisions of this title with respect to the deposit of copies and registration of such work shall have been complied with.'

The question is thus whether plaintiffs have a registered United States copyright upon the book which Putnam published so as to entitle them to sue for infringement.

The law is clear that when revisions or additions are made to a work which lies within the public domain, the copyright protection secured by registration of that work extends at most only to the revisions [**8] and additions, i.e., to the work which was original with the author who seeks the copyright. The classic example is the revised edition of Shakespeare published with a new preface

or commentary. The copyright registration protects only the preface or commentary, not Shakespeare's text. <=4> Kipling v. G. P. Putnam's Sons, 120 F. 631, 65 L.R.A. 873 (2d Cir. 1903); <=5> American Code Co. v. Bensinger, 282 F. 829 (2d Cir. 1922); <=6> Axelbank v. Pony, 277 F.2d 314 (9th Cir. 1960).

If this principle applies here, then plaintiffs have copyright protection, at best, only with respect to the revisions which the authors made to the French edition of 'Candy.' There may be a question as to whether plaintiffs have even

23S F. Supp. 18, *25; 1964 U.S. Dist. LEXIS 9096, **16; 143 U.S.P.Q. (BNA) 94

Johnston in an exhaustive opinion, Stevens-Davis Co. v. Mather & Co., 230

Ill.App. 45 (1923). He stated (at pp. 65-66):

'The courts in this State do not treat the 'palming off' doctrine as merely the designation of a typical class of cases of unfair competition, but they announce it as the rule of law itself _ the test by which it is determined whether a given state of facts constitutes unfair competition as a matter of law. As the Supreme Court of this State said in the case of DeLong Hook & Eye Co. v. Hump Hairpin Mfg. Co., supra, quoting from the Supreme Court of the United States in the case of Howe Scale Co. v. Wyckoff, Seamans & Benedict, supra: 'If defendant so conducts its business as not so palm off its goods as those of complainant, the action fails.' [**17] We are of the opinion from our examination of the authorities, that the 'palming off' doctrine has been followed by both the state and federal courts in an almost unbroken line of decisions, as a rule of law, and that the courts of this state also deem it to be a rule of law.' (Emphasis in original.)

The rule in the Stevens-Davis case has been followed by the state courts and the federal courts where the two parties were in direct competition. <=31> Soft-Lite Lens

Co. v. Ritholz, 301 Ill.App. 100, 105-106, 21 N.E.2d 835 (1939); <=32> Addressograph-Multigraph Corp. v. American Expansion Bolt & Mfg. Co., 124 F.2d 706 (7th Cir. 1941); <=33> National Nut Co. v. Kelling Nut Co., 61

LEXIS(R) Case Law Signal: STOP — Consult Citation Services <SHEP> <AC>

LEVEL 1 — 15 OF 50 CASES

GREY v. CAMPBELL SOUP CO.

No. CV 83–7291–RJK (gx)

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

650 F. Supp. 1166; 1986 U.S. Dist. LEXIS 20432; 231 U.S.P.Q. (BNA) 562

September 12, 1986

OPINION:

. . . [*1169] [**4] 28, 1983, ten months after he left Godiva. The evidence shows this was the first time Pechenik ever heard of DOGIVA and Grey. By that time Pechenik had organized Gourmet Resources, Inc., a competitor in the chocolate field. Pechenik telephoned Grey sometime between April 28 and May [**ILLEGIBLE**], 1983 and encouraged her in this project.

PAGE 43

88 F.3d 473, *479; 1996 U.S. App. LEXIS 16281; F.3d 39 U.S.P.Q.2D (BNA) 1444; Copy. L. Rep. (CCH) P27,541

It states that any exclusive rights created by Congress shall accrue only to "authors and inventors" with respect to their "Writings and Discoveries." This constitutional requirement expresses itself in the modern axiom that "the

sine and non of copyright is originality." Feist Publications, Inc. v. Rural Tel. Serv. Co., Inc., 499 U.S. 340, 345, 111 S. Ct. 1282, 1287, 113 L. Ed. 2d 358 (1991); see also Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 4 S. Ct. [**ILLEGIBLE**] 28 L. Ed. 349 (1884); The Trade-Mark Cases, 100 U.S. (10 Otto) 82, 25 L. Ed. 550 (1879).

Subsumed within the concept- of originality is the requirement that copyrightable works possess some minimum indicia of creativity, that they be "original intellectual conceptions of the author." Burrow-Giles, 111 U.S. at 58, 4 S. Ct. at 281. Because no person can claim original conception of facts, they are excluded from copyright protection. Harper & Row Publishers, Inc. v. Nation [**ILLEGIBLE**], 471 U.S. 539, 556, 105 S. Ct. 2218, 2228, 85 L. Ed. 2d 588 (1985).

According to the Copyright. Act of 1976, the subject matter of copyright is an original work of authorship that is fixed in a tangible medium of expression. 17 U.S.C. @ 102(a). Such works of authorship may fall into one of several categories identified in @ 102(a), which include literary works. Section 102(b) excludes certain subject matter from copyright protection:

> In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.

U.S.C. @ 102(b). As explained by the Supreme Court in Harper & Row, this section is commonly viewed as the statutory basis for the fact/expression or idea/expression dichotomy, 471 U.S. at 547, 556, 105 S. Ct. at 2223, 2228, which embodies the boundary between copyright and patent. It is this section of the Copyright Act that we look to in answering the question presented in this [**ILLEGIBLE**].

III

A

To establish its claim of copyright infringement by PIL, Meredith must prove ownership of a valid copyright and PIL's copying of "constituent elements of the work that are original." Feist, 499 U.S. at 361, 111 S. Ct. at 1296; see also Atari, Inc., 672 F.2d at 614. Meredith claims that PIL infringed its copyright by reproducing in its own publications many of the recipes that Meredith had published in DISCOVER DANNON. As noted above, PIL's recipes are not verbatim copies of Meredith's recipes but do appear designed to achieve the same results.

There is some disagreement over the nature of Meredith's copyright in DISCOVER DANNON. PIL claims that Meredith has only a "compilation" copyright in DISCOVER DANNON. Meredith argues that it has a compilation copyright in DISCOVER DANNON in addition to copyrights in the individual recipes themselves because it claimed copyright in a "collective work." Meredith described DISCOVER DANNON in section 2a of the certificate of registration as a "collective work," but in section 6b of the same certificate, it entered the following description of the material for which it claimed copyright protection: "Recipes tested with

235 F. Supp. 18, *; 1964 U.S. Dist. LEXIS 9096, **I; 143 U.S.P.Q. (BNA) 94

Dean A. Olds, Jerome Gilson and James B. Blanchard, Hume, Groen, Clement & Hume, Chicago, Ill., for defendant.

OPINION BY: DECKER

OPINION: [*20]

This is a suit brought by Spangler Candy Company (Spangler), plaintiff, against Crystal Pure Candy Company (Crystal), defendant, for trademark infringement and un-

fair competition. The defendant has counterclaimed for damages resulting from alleged unfair competition on account of news stories caused to be published by the plaintiff in trade journals and statements to defendant's customers by plaintiff's representatives concerning the subject of the plaintiff's suit.

Spangler an Ohio corporation with its principal place of business in Bryan, Ohio. Crystal is a partnership with partners residing in the states of Illinois and New York and having a principal place of business at Chicago, Illinois.

This Court finds that there is diversity of citizenship between the plaintiff and all of the partners of the defendant partnership and that the amount in

650 F. Supp. 1166, *1169; 1986 U.S. Dist. LEXIS 20432, **4; 231 U.S.P.Q. (BNA) 562

In the spring and summer of 1983, Grey began the production, marketing and sale of her product. After she . . .

. . . [*1172] [**14] Godiva's products, is wholly arbitrary and fanciful; it has no descriptive or suggestive meaning when used for such products and therefore is inherently distinctive. See <=7> Fleischmann, 314 F.2d at 154. It is also admitted that the trademark GODIVA has been used continuously on chocolates and candy since 1960 and that since 1979 sales and advertising for GODIVA food products have exceeded $65,000,000 and $5,750,000, respectively.

The trademark GODIVA is used on all of Godiva's products and has been extensively advertised in a variety of media including magazines, point-of-sale materials, mail-order catalogs, television and radio commercials, newspaper advertisements, department store catalogs, and charge account inserts. Such .substantial advertising and sales of GODIVA chocolates and other food products constitute com-

pelling circumstantial evidence of the strength of this trademark and have resulted in a high degree of public awareness of the GODIVA. GODIVA accordingly is an arbitrary, fanciful and strong mark and, as a matter of law, is . . .

88 F.3d 473, *476; 1996 U.S. App. LEXIS 16281; F. 3d
39 U.S.P.Q.2D (BNA) 1444; Copy. L. Rep. (CCH) P27,541

[**ILLEGIBLE**], and PIL filed a notice of appeal on October 13.

I

Before getting to the merits, we address a procedural oddity that causes us some concern. The district court issued the preliminary injunction based upon findings of fact and law contained in its order dated October [*477] 6. This order was preceded by Meredith's original motion for the injunction, PIL's response, and Meredith's reply, all of which were on file with the district court by August. 31. On September 27 (ten days prior to the October 4 hearing), Meredith tendered what it termed "supplemental evidence" to the district court, [**ILLEGIBLE**] purported to "prove beyond any doubt that PIL knew that the recipes it obtained from Dannon, and which it copied for use in its infringing publications, came straight from Meredith's publication, Discover Dannon."

This supplemental evidence consisted of a letter, written on Dannon letterhead, from Eileen O'Gorman to Ivy Lester of PIL. The letter references an enclosed list of 102 recipes that includes each recipe's "title and origin." Meredith claimed in its submission that the attached list of recipes demonstrated that the sources of origin for many of the recipes were Meredith publications, namely DISCOVER DANNON and THE BETTER HOMES AND GARDENS COOKBOOK. Indeed, the list does identify 13 recipes as originating in DISCOVER DANNON and [**ILLEGIBLE**] as originating in in THE BETTER HOMES AND GARDENS COOKBOOK.

In its order issuing the injunction, the district court made the following findings:

The next element Meredith would have to show to prevail on the merits would be that PIL copied Meredith's copyrighted work. There is adequate and indeed conclusive evidence that this is precisely what PIL did. PIL received recipes from The Dannon Company. As indicated by the [sic] Meredith's latest submission to the Court, Dannon's submission to PIL made clear to PIL that many of the recipes were indeed derived from Discover Dannon.

It seems clear that the district court based this finding in substantial part [**ILLEGIBLE**] Meredith's September 27 submission.

So must it also have seemed to PIL. In two motions filed on October 11 (one week after the hearing at which PIL was not represented), PIL moved the district court to vacate the preliminary injunction and to strike Meredith's September 27 submission. In its motion to vacate the injunction, PIL wrote:

It is inappropriate for the Court to rely upon Meredith's submission of alleged additional evidence of PIL's copying because there is insufficient proof that PIL ever received the document which Meredith claims shows PIL's knowledge of the source of certain recipes. As is set forth in the Motion to Strike that [**ILLEGIBLE**], which is being filed contemporaneously with this motion, PIL never received that document and nothing contained therein may be imputed to PIL.

The motion to strike echoed this point, arguing that the document was not authenticated and that it contained no evidence that PIL had ever received it. In support of the motion to strike, PIL submitted the affidavits of two PIL employees, including the addressee of the letter, in which they deny ever seeing the document.

239 F. Supp. 782, *;
1965 U.S. Dist. LEXIS 9592, **1; [ILLEGIBLE]
144 U.S.P.Q. (BNA) 530

Falk, Twelvetrees, Johnson & Seimer, Buffalo, N.Y., for defendant J. W. Clement Co., Amster & Rothstein, Morton Amster, Jesse Rothstein, New York City, of counsel.

Benjamin E. Winston, New York City, for defendant Publishers Distributing Corp.

OPINION BY: McLEAN

OPINION: [*783]

This is an action for alleged copyright infringement and unfair competition. Plaintiffs have moved for a preliminary injunction. The Court held a hearing at which testimony was taken and many of the essential facts were stipulated. The court finds that facts to be as follows. n1

In or prior to 1958, plaintiffs Terry Southern and Mason Hoffenberg, who are American citizens, wrote a novel which was published in France in 1958, in the English language, under the title of 'Candy.' Another edition, also in English, was published in France under the title of 'Lollipop.' Both editions were published by Olympia Press and both [**2] showed the author as Maxwell Kenton, a pseudonym which Southern and Hoffenberg employed. The French